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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1064

WILLIAM A. WATERS AND DONALD SAMUELS,
Petitioners,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY AND UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY IN OPPOSITION

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BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY IN OPPOSITION

The issues presented in the Petition for Certiorari do not arise on the record below. Petitioners' basic misapprehension of the legal and factual issues actually decided by the lower courts is itself one of several reasons for denying *certiorari*. Before discussing the factors which make *certiorari* inappropriate in this case, it is necessary, in view of petitioners' misstatement of material facts, to restate the case.

STATEMENT OF THE CASE

Before the Seventh Circuit, the District Court's decision was attacked by all parties for its arbitrariness. Construing the equal employment opportunity statutes, the Court of Appeals reviewed numerous interrelated questions of liability which turned on facts peculiar to the parties. In its result, the Seventh Circuit strained to affirm the judgment of liability in favor of the petitioner Waters.

Four central aspects of the record are misstated in the Petition for Certiorari. Their correction eliminates the basis for petitioners' claims of error and detracts significantly from the illusory aura of importance which the Petition attaches to this case. The four points are: (1) neither petitioner had suffered discrimination from the alleged early practice of discriminatory hiring which had ended, by petitioners' admission, prior to 1964; (2) the seniority system in issue operated in a racially neutral manner as to petitioners; (3) respondent Wisconsin Steel Works' hiring and recall policies had no discriminatory impact on petitioner Samuels; and (4) Wisconsin Steel's job offer to petitioner Waters in 1967 was *bona fide* and required no waiver by him of any legal claims. As these points suggest, it is essential to an understanding of the Seventh Circuit's narrowly drawn rulings to recognize that this case involves only the unique individual claims of the two petitioners since all class allegations were abandoned prior to trial.

1. The Absence of Findings or Evidence That Petitioners Were Discriminated Against By Claimed Pre-1964 Discriminatory Hiring Practices.

Neither court below found that either of the two petitioners had been discriminated against prior to 1964, when several blacks including petitioner Waters were hired as

bricklayers at respondent Wisconsin Steel Works.* (Plf. Ex. 3; Tr. 18-22).** Petitioner Samuels' only contact with Wisconsin Steel occurred in 1966, when he mailed a racially-anonymous application form to the company at a time when both white and black bricklayers were on layoff. (Def. Ex. 2; Def. Ex. 3, p. 9). Waters' only pre-1964 contact with Wisconsin Steel occurred in the Fall of 1957 during a prolonged period of non-hiring, when he inquired of a plant guard regarding the prospects for employment. (Tr. 16-18). Waters admitted he was told Wisconsin Steel was not hiring bricklayers. (Tr. 16-18, 40). This was true. Undisputed employment records documented that no bricklayer, white or black, was hired over a two-year period from January 14, 1957, to February 9, 1959. (Plf. Ex. 3). No evidence, much less any finding, supports petitioners' pivotal but false premise that Waters himself was a victim of discrimination prior to 1964.

In fact, the Court of Appeals strained to sustain the District Court's conclusory finding that Wisconsin Steel had discriminated in hiring bricklayers prior to 1964. This finding was affirmed under the "clearly erroneous" standard on the following circumstantial evidence: (1) the small contingent of bricklayers at Wisconsin Steel included no black until 1964; (2) on three occasions between 1949 and 1964, a black bricklayer asked about employment during periods

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* The year 1964 is a point of demarcation in this case. In that year several black bricklayers were hired, thus ending the claimed "practice" of discrimination in hiring bricklayers even under petitioners' theory. A specific, unique collective bargaining agreement between the respondents in 1966 was the primary basis for the two petitioners' individual claims of discrimination, apart from the application of the "last hired, first fired" seniority principle to persons, such as petitioners, who did *not* suffer discrimination during the alleged pre-1964 period of discriminatory hiring.

** All factual references herein are to the original trial record.

of extended non-hiring;* and (3) twice between 1946 and 1964, a black laborer had sought admittance into a bricklayers' apprentice program.**

On appeal, respondents challenged the adequacy of this circumstantial evidence, particularly in view of the District Court's erroneous characterization of certain evidence and the District Court's refusal to permit respondents to develop historical rebuttal evidence at trial.*** Respondents also argued that no one of the five unrelated inquiries by black bricklayers or laborers satisfied the *prima facie* case requirements set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The Seventh Circuit held that *McDonnell Douglas* did not apply since the court felt petitioners were not required to prove individual instances

* The undisputed circumstances of these inquiries are summarized below:

Bricklayer	Date of Inquiry	Period of Non-hiring (Plf. Ex. 3)
Pearson (Tr. 61-63)	Fall, 1949	4/21/48 to 5/14/52
Pearson (Tr. 63-67)	"Some time in 1953"	2/13/53 to 11/ 2/54
Waters (Tr. 16-18)	Fall, 1957	2/14/57 to 2/ 9/59

** The undisputed facts concerning these two isolated instances are: witness Watkins testified that he was turned down by the apprentice program in 1946 because he was overage. (Tr. 99-100). Petitioners' other witness, Mays, inquired about the apprenticeship program "around" 1953 and was told that no apprentices were being hired at the time. (Tr. 107-11). No bricklayer *or* apprentice was in fact hired between July 6, 1953 and November 2, 1954. (Plf. Ex. 3).

*** At trial, respondents were cut off from explaining the absence of black bricklayers, after they had proven an affirmative, ongoing recruitment drive directed toward blacks in the 1940's (Tr. 140-43), on the ground that petitioners had abandoned their class allegations and that historical evidence concerning the pre-1964 period was irrelevant. (Tr. 14-16). The trial court's eventual conclusion of past discrimination thus came as a complete surprise.

of discrimination in circumstantially evidencing discriminatory hiring patterns.*

With circular reasoning, petitioners now suggest that even though no individual instance of discrimination was proven for the period prior to Title VII's effective date,** the Court may infer that Waters' Fall 1957 inquiry was in fact a case of individual discrimination. Petitioners assert:

> "Waters first sought a job at Wisconsin Steel during the fall of 1957. *Had he been white he would have been hired at that time,* would have been laid off only infrequently in the following years, and would by now have accumulated 18 years of seniority." (Pet. 11-12).

This assertion is false, as borne out by petitioners' prior inconsistent theory***, their own inconsistent evidence, and the absence of supporting findings by either lower court.

2. The Seventh Circuit's Ruling That the Bricklayers' Seniority System Had No Racially Discriminatory Impact on Petitioners.

Pervading petitioners' arguments is the erroneous and misleading assertion that, "the Court of Appeals did not

* The Seventh Circuit's dispatch of respondents' objections to the finding of past discrimination evidences a "leaning-over backward" for petitioner's sake. If *certiorari* were granted, which it should not be, it would be appropriate for the Court to scrutinize the finding of past discrimination, including (a) the trial court's preclusion of relevant evidence, (b) the trial court's erroneous findings, (c) the inadequacy of statistical inferences drawn from such a small group with infrequent hiring and an unknown application rate, and (d) the application of the *McDonnell Douglas* decision to petitioners' circumstantial evidence of five isolated inquiries made over an eighteen-year period, from 1946 to 1964.

** Title VII of the 1964 Civil Rights Act became effective on July 2, 1965 (78 Stat. 253).

*** Neither petitioners' Complaint nor their post-trial submissions urged that Waters' Fall 1957 contact with Wisconsin Steel was an instance of individual racial discrimination. (*See* Complaint ¶ 8; Plfs. Prop. Find. & Conc. ¶¶ 10-18).

deny . . . that the seniority system had the effect of continuing the discriminatory impact of that [pre-1964] misconduct." (Pet. 15). In fact, the Seventh Circuit explicitly held to the contrary: the seniority system did *not* perpetuate past discrimination on the facts presented.

> "We are of the view that Wisconsin Steel's employment seniority system embodying the last hired, first fired principle of seniority is not of itself racially discriminatory [n]or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII. . . .
>
> . . .
>
> ". . . On balance, we think Wisconsin Steel's seniority system is racially neutral and does not perpetuate the discrimination of the past." (App.* 12a, 16a; 502 F.2d at 1318, 1320).

Plainly, the Court of Appeals did "deny" that Wisconsin Steel's seniority system had the effect of continuing prior racial discrimination.

In the context of petitioners' claims, the Seventh Circuit determined that the seniority system operated in a racially neutral and nondiscriminatory manner. Waters, as a new hire in 1964, and Samuels, as a new applicant in 1966, claimed an outright exemption from the use of an actual-length-of-service principle in determining the order of layoff and recall. Their theory advocated that, regardless of the fairness of the seniority principle to petitioners, the earned seniority of employees with longer service should be discounted because of claimed prior discrimination against others. In other words, certain white bricklayers possessed earned seniority after 1964 which they would not have enjoyed if they had not been hired during the discriminatory

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* "App." refers to the Appendix to the Petition for a Writ of Certiorari, which reprints the decisions below in this case.

period; therefore, according to petitioners, those white bricklayers should be precluded from being treated according to their actual earned seniority as against subsequently-hired blacks, such as Waters, or even subsequent black applicants, such as Samuels. This theory was the narrow issue posed to and rejected by the Seventh Circuit.

On the facts of this case, the Seventh Circuit determined that the "seniority system gives full credit to all bricklayers for their actual length of service or earned seniority as bricklayers." (App. 3a; 502 F.2d at 1313). In addition, Wisconsin Steel had a long standing company policy of recalling former employees, including bricklayers, in the order of their length of service after employees with contractual seniority rights. (App. 4a; 502 F.2d at 1313). After Waters' initial hire in 1964, he was twice laid off and recalled, each time in strict accordance with his seniority. Thus, Waters twice received a priority over new applicants and was affirmatively recalled to work because of the company's respect for his and others' prior service.* In addition to benefiting Waters, the seniority principle resulted in a total of five black bricklayers (24 percent of those laid off and recalled) being offered recall in 1967 ahead of new applicants. (Plf. Ex. 2 & 3). At Wisconsin Steel, the system of "earned seniority" based on actual length of service was racially neutral in operation as well as principle.**

In this factual context, the Court of Appeals decided that neither Waters nor Samuels was entitled to employment

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* The fairness of Waters' layoffs are detailed in the Seventh Circuit's decision. (App. 3a-4a; 502 F.2d at 1313). When Waters refused his second recall, a new black applicant was hired in his place and worked continuously at Wisconsin Steel thereafter. (See Plf. Ex. 3).

** Petitioner Samuels testified that he felt it was fair for persons with seniority to be recalled before new applicants, such as himself, were hired. (Samuels Dep. at 90-91).

privileges in derogation of the earned seniority of longer-service white and black bricklayers.

3. The Purpose and Effect of Respondents' March 1965 Severance Pay and June 1966 Amendatory Agreements.

Apart from the legality of the earned seniority principle as applied to the petitioners, the Court of Appeals reviewed the legitimacy of two related collective bargaining contracts by which respondents first released eight senior white bricklayers and later reemployed three of them. Once again, the appellate court's decision is bottomed on a consideration of the unique facts of this situation* as related to each petitioner.

The two collective contracts came about after Wisconsin Steel estimated a massive plant-wide reduction in personnel, including bricklayers, following its anticipated conversion from twelve open hearths to two basic oxygen furnaces. Wisconsin Steel encouraged eight bricklayers, possessing five to six years of contractual seniority, to accept a severance allowance in March 1965 rather than remain on layoff for two years and lose their seniority rights without any compensatory adjustment. By the next year, Wisconsin Steel realized its bricklaying manpower forecasts had been greatly underestimated. Feeling that it had unintentionally induced eight senior bricklayers into a premature forfeiture of contractual rights, Wisconsin Steel agreed in June 1966 to restore their seniority for recall purposes. Three of the eight bricklayers accepted recall shortly before Waters. (App. 3a-5a; 502 F.2d at 1313-14). Three other black bricklayers with much less experience at Wisconsin Steel were also recalled. (Plf. Ex. 2 & 3).

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* Petitioners themselves acknowledge the uniqueness of this factual situation by terming the contracts a "special *ad hoc* rule" governing recall of the eight bricklayers who had accepted severance pay. (Pet. 11 n. 11).

The labor relations significance of this unique situation is obvious. The person negotiating the contracts for Wisconsin Steel was responsible for union relations and was solely concerned with defusing a potential labor disruption over the company's conduct. He was not involved in the hiring process and did not know the race of any of the bricklayers involved. (Tr. 171, 177, 187-89). The trial court explicitly found an "absence of a racially discriminatory motive on the part of the two [respondents]."* (App. 29a).

Despite respondents' good faith and legitimate business reasons for entering into the two collective agreements,** the Seventh Circuit affirmed liability as to Waters, while reversing as to Samuels. The court decided that placing white bricklayers who had accepted severance pay ahead of former employees, such as Waters, on the recall roster was an improper application of the length of service standard.*** (App. 17a; 502 F.2d at 1321).

With respect to Samuels, the Court of Appeals found that different considerations governed:

> "We do not doubt that a policy favoring recall of a former employee with experience even though white before considering a new black applicant without experience comports with the requirements of Title VII and section 1981. To that end, we do not perceive any discriminatory impact with respect to Samuels who was a new applicant." (App. 16a; 502 F.2d at 1320).

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* Petitioners ignore the unchallenged finding that respondents acted with no racial animus. (See Pet. 7-8, 29).

** The Seventh Circuit rejected the applicability of the *McDonnell Douglas* standards for judging an individual claim of discrimination in connection with the 1965 and 1966 agreements.

*** The Seventh Circuit also rejected Wisconsin Steel's position that, just as Waters was entitled to the benefit of the company policy regarding recall of former employees without contractual seniority, so were the white bricklayers who had been induced to give up their contractual seniority.

On these facts, the court approved the legitimacy of using a "past experience" criterion in making individual hiring decisions. Significantly in this case, Wisconsin Steel's use of a "past experience" or "former employee" preference over new, untested applicants ensured the recall of Waters and three other black bricklayers before new applicants were hired. Because Waters and other blacks were benefited by the company recall policy, petitioners have never attacked its validity or racial neutrality despite the fact this policy too is based on actual length of service.

Other facts important to the appellate court's judgment as to Samuels are completely ignored in the Petition. *First,* Wisconsin Steel never knew Samuel's race until the Complaint was filed, since he mailed his application for work and the application form did not permit racial identification. (Tr. 171, 177, 187-89; Def. Ex. 3, p. 9). *Second,* the first new bricklayer applicant hired in 1967 happened to be black (Mills) and remained at Wisconsin Steel without layoff. (Plf. Ex. 3). *Third,* the recall of former employees was never shown to have an adverse disproportionate effect on blacks. (See Plf. Ex. 2 & 3).

Petitioners' unfamiliarity with the record is once more revealed in their patently erroneous assertion that the "former employees hired instead [of Samuels] were, because of the company's previous policy of discrimination, all white." (Pet. 12). One bricklayer (Maten) with contractual seniority recalled in January 1967 was black. (See Plf. Ex. 2 & 3). Moreover, Waters himself was recalled in March 1967. He was the fifth black on the recall roster to be offered reemployment. (*Ibid.*)

4. Waters' Voluntary Decision Not to Accept Reemployment at Wisconsin Steel.

As the Seventh Circuit determined, due to the June 1966 amendatory agreement, Waters was recalled to work in March 1967 instead of January 1967 and was laid off from

May 1967 until September 1967, at which time he was recalled a second time. (App. 18a; 502 F.2d at 1321). At the time of his second recall, Waters was working elsewhere as a bricklayer and he declined the offer. (Plf. Ex. 4 & 5; Tr. 29-31, 36). If Waters had accepted recall, he would have received the full journeyman bricklayer's wage rate, worked continuously from that date forward, and earned contractual seniority. (Plf. Ex. 2, pp. 10-11). On these particular facts, the appellate court ruled that the "discriminatory impact of defendants' June 1966 agreement ended with the tender made to Waters in September [1967]." (App. 18a; 502 F.2d at 1321).

As before, petitioners seriously misstate the record supporting this ruling. Petitioners first contend that Wisconsin Steel conditioned recall on a waiver of Waters' claim. In fact, Waters was never asked to waive anything. As petitioners admitted before the Seventh Circuit, Waters would have been asked only to sign a standard form related solely to computation of seniority under the collective bargaining agreement. (Plf. Brief, p. 16). However, Waters never went to Wisconsin Steel in September 1967 and was not asked to sign even this standard form.

Next, petitioners frivolously state that Wisconsin Steel neglected to assure Waters it would not argue that his execution of the standard form on his return to work constituted a waiver. (Pet. 27). The fact is that previously, in March 1967, Waters had accepted recall and had signed the standard form. (See App. 4a; 502 F.2d at 1313). Wisconsin Steel had never indicated that Waters' action in March was any kind of waiver, and there is no basis for arguing that identical action by Waters a few months later would have been so construed by anyone.

Finally, petitioners contend that Waters was justified in refusing recall because he feared layoff and had a more secure job. (Pet. 28). Undoubtedly, Waters did have a different job which he preferred in September 1967; but his voluntary decision to keep that job instead of accepting

recall affords no equitable basis for making Wisconsin Steel a perpetual insurer of Waters' income.

Petitioners are guilty of hyperbole as well as misstatement. They charge that the recall offer was a "deliberate and callous attempt by Wisconsin Steel to sabotage Waters' pending claim." (Pet. 29). Petitioners ignore the unchallenged finding that respondents acted *without* invidious motive and the undisputed fact that the recall offer was routinely made from the automatic application of company recall policy. Far from "sanctioning sabotage" (Pet. 29), the Court of Appeals merely determined on these facts that Wisconsin Steel's reemployment offer in September 1967 was reasonable.*

REASONS FOR DENYING THE WRIT

Most fundamentally, the Petition should be denied because the "questions presented" do not fairly arise from the record below. Petitioners assume nonexistent facts, advance contentions not presented below, and extrapolate rulings never rendered by the Court of Appeals. The resulting errors irreparably impair the Petition's arguments and make the issuance of a Writ of Certiorari highly inappropriate.**

Moreover, the Seventh Circuit's actual rulings adverse to petitioners were soundly decided and create no conflict with decisions of other Courts of Appeal. The appellate decision was carefully drafted to resolve the unique legal issues posed by the facts of this case and was expressly

* This determination is particularly sound since Waters' "claim" for damages back to 1964 (or, as now argued, to 1957), urged in the Petition as a reason for refusing recall, eventually was held invalid.

** See *Tyrrell* v. *District of Columbia*, 243 U.S. 1, 4 (1917); *Furness, Withy & Co.* v. *Yang-Tsze Insurance Ass'n., Ltd.*, 242 U.S. 430, 431, 434 (1917).

limited in this regard. Under these circumstances, also, the Petition should be denied.

I.

The Court of Appeals Decided Wisconsin Steel's "Last Hired, First Fired" Seniority Rule Was Not Discriminatory And Thus Never Reached the Questions of Remedial Authority Presented In the Petition.

Petitioners miss the entire thrust of the Seventh Circuit's decision sustaining Wisconsin Steel's seniority system. Although the appellate court determined the seniority system did *not* perpetuate past discrimination, petitioners have turned the decision on its head and have persuaded themselves that the court actually found the seniority system to have "perpetuated the effects of past discrimination" and to have had a "discriminatory impact on black employees and job applicants." (Pet. 2). Proceeding from this erroneous assumption, petitioners derive a non-existent question of law:

> "The Court of Appeals did not deny that [the use of 'last hired, first fired' seniority] served to perpetuate the effects of past discrimination, but held that such discrimination enjoyed absolute immunity from legal attack because of Section 703(h) of Title VII of the 1964 Civil Rights Act. . . .
>
> ". . . The critical issues of employment discrimination law at present involve remedies. *This case presents important questions involving the scope of remedial authority vested in the district courts once discrimination has been established.*" (Pet. 8-9).

In short, petitioners misconceive the Seventh Circuit's decision to be a ruling on "remedial powers" in the mold of *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th

Cir. 1974), *cert. granted* (No. 74-728, March 24, 1975).* The analogy is false and the coattails of the Writ in *Franks* do not extend to the present case.

The Court of Appeals held that Wisconsin Steel's bricklayer seniority system was genuinely nondiscriminatory and was therefore preserved by Section 703(h) of the 1964 Civil Rights Act. This ruling reflected two facts: (1) petitioner Waters was not shown to have been a victim of discrimination in hiring; and (2) even were it otherwise, the bricklayers' seniority system gave every worker full and equal credit for his actual length of service in determining layoffs and recalls. Since the respondents' seniority system was racially neutral, the Seventh Circuit never reached the difficult problems involved in fashioning equitable relief against a discriminatory seniority system. The Court of Appeals' decision was confined to Waters' basic charge of race discrimination, which the facts of this case did not sustain: "we think Wisconsin Steel's seniority system is racially neutral and does not perpetuate the [alleged] discrimination of the past." (App. 16a; 502 F.2d at 1320). *Nowhere do petitioners challenge directly or seek review of this pivotal conclusion on the merits.*

Petitioners miss the fundamental difference between employers' *substantive obligations* under Title VII and Section 1981, on the one hand, and the *equitable remedies* available

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* Petitioners repeatedly and incorrectly characterize the opinion below as holding that seniority systems that discriminate in the present day are immune from redress. The Seventh Circuit confronted no question of "the scope of remedial authority vested in the district courts once discrimination has been established." (Pet. 12). Nor did the Court of Appeals "read 703(h) [of Title VII] as establishing a *per se* rule that any contractual seniority system . . . is excluded from the reach of Title VII regardless of whether it has a discriminatory impact." (Pet. 15-16). Petitioners' doomsday interpretation of the result below has no basis in reality.

to employees *after* a violation of those provisions has been proven.* Thus, in *Franks* v. *Bowman Transportation Co.*, and in numerous other cases cited by petitioners (*see* Pet. 9 n. 7, 13-14, 17-21), the courts faced departmental or job seniority systems that had the effect of gerrymandering seniority rights and of denying minority workers full credit for their actual length of service. In those cases, discrimination was found in the operation of the seniority systems, and the difficult judicial questions were indeed the formulation of appropriate remedial decrees. By contrast, in this case, the Court of Appeals held not that petitioners' remedies were limited by Section 703(h), but rather that petitioners' rights had not been violated by the seniority system. The Seventh Circuit expressly distinguished respondents' actual-length-of-service seniority rule from discriminatory departmental or job seniority systems. (App. 11a-12a; 502 F.2d at 1318-20).

Petitioners do not seek review of the validity of Wisconsin Steel's seniority system. Their questions and arguments are framed so as to overarch all types of seniority issues under the civil rights laws; thus, they suggest treating the entire complex of "possible legal situations" through a set of multifaceted "instructions" from the Court. (*See* Pet. 10-11, 16). This sweeping request for a subject-matter Writ is plainly inappropriate. Moreover, petitioners' mischaracterization of the Seventh Circuit's seniority ruling provides their only vehicle for finding "conflict" and "error" in support of the Petition. Stripped of its artificiality and generality, the Petition offers no basis on which the Writ should issue.

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* In *Milliken* v. *Bradley*, 418 U.S. 741, 745, 747 (1974), the Court pointed out the impropriety of fashioning a broad equitable remedy without first establishing a substantive violation of the law.

II.

The Seventh Circuit's Decision Upholding Respondents' Seniority System Reflected Unequivocal Legislative History and Absolute Consistency Among the Circuits.

The Court of Appeals decided the narrow question whether respondents' strict and neutral application of a "last hired, first fired" seniority rule comported with the nondiscrimination requirements of Title VII and Section 1981. The Seventh Circuit upheld that seniority rule, finding undiluted confirmation of its decision both in the relevant legislative history and in analogous judicial rulings. (App. 11a-15a; 502 F.2d at 1317-20). Those authorities acknowledge that the touchstone of the law is whether the employer honors each worker's earned seniority and thus gives equal effect to "white" and "black" time actually spent in the employer's service.

When the 1964 Civil Rights Act was under consideration, Congress took extraordinary steps to record its purposes and, among them, to ensure the survival of legitimate seniority concepts. Title VII of the original House Bill, H.R. 7152, was written in broad terms and sent directly to the floor of the Senate. See EEOC, *Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, 9-10. Since there were to be no Senate Committee Reports, bipartisan co-captains were appointed to provide detailed interpretations of the various titles, and Senators Clark and Case were assigned to Title VII. 110 *Cong. Rec.* 4858-59 (March 10, 1964). The exegetical stature of their interpretative work was well known to the Senate and has since been relied on by this Court. *Griggs* v. *Duke Power Co.* 401 U.S. 424, 434-35, 434n.11 (1971)•

• See also *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 547 nn.5, 6 (1971) (Marshall, J., concurring); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Quarles* v. *Phillip Morris, Inc.*, 279 F.Supp. 505, 516 (E.D. Va. 1968). Petitioners themselves rely on the Clark-Case memoranda as legislative history at one point (Pet. 23), only to disparage their relevance shortly thereafter (Pet. 24-25).

Thus, when the bill was under consideration, Senators Clark and Case offered a detailed interpretative memorandum on Title VII and other explanatory documents that are reviewed in full in the opinion of the Court of Appeals. (*See* App. 12a-13a; 502 F.2d at 1318-19). They emphasized that the "last hired, first fired" principle of seniority would be valid under the Act, even if there had been discrimination in the past, and would not constitute discrimination by reason of race. 110 *Cong. Rec.* 7217 (April 8, 1964). The Clark-Case analysis of the "last hired, first fired" seniority concept is the clearest imaginable documentation of Congressional understanding.•

• Contrary to petitioners' assertions (Pet. 25), there is no chronological disability in the Clark-Case memoranda as interpretive guides to Title VII. After those memoranda were prepared, some Senators had still feared that the language of H.R. 7152 would be given broader meaning than was intended. Specific clarifying amendments were thus included by Senators Dirksen, Mansfield, Humphrey, and Kuchel in the bill as it was eventually enacted on July 2, 1964. See EEOC, *Legislative History* at 10-11. Among those amendments was Section 703(h) relating to seniority. Senator Humphrey expressly negated any suggestion that the amendments altered the prior construction of the bill offered by Senators Clark and Case: "The basic coverage and the substantive prohibitions of [Title VII] remain almost unchanged. . . . [N]or have there been any significant changes in the sections specifying what actions constitute unlawful employment practices." 110 *Cong. Rec.* 12,721 (June 4, 1964). Senator Humphrey further explained that the amendments had been added in order to "remove certain ambiguities and uncertainties which existed in the House text." 110 *Cong. Rec.* 12,725 (June 4, 1964). Petitioners' attempt to separate Section 703(h) from the legislative history by inventing a "new civil rights bill" of May 26, 1964 (*see* Pet. 25) is simply frivolous.

These facts of legislative history were fully detailed to the Seventh Circuit in two rounds of briefs. Petitioners, though, have never seen fit to respond. They persistently ignore this Court's reliance upon the April 1964 Clark-Case memoranda in construing the "testing" provision of the same Section 703(h) in *Griggs* v. *Duke Power Co.*, 401 U.S. at 434-35, 434 n.11.

Moreover, the Seventh Circuit's decision upholding respondents' "last hired, first fired" seniority rule as nondiscriminatory finds no conflict in the decisions of other Circuits. Specifically, no other Circuit has ruled in circumstances where (1) the only alleged discrimination relating to the seniority system pre-dated Title VII and where (2) no plaintiff could show himself to have been an actual victim of discrimination in hiring even in the pre-1964 period.*

The authority that does exist, though, endorses the result reached in this case. On a general level, this Court explained in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-431 (1971), that:

> "[Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.* What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

On the specific question of "last hired, first fired" seniority, the Fifth Circuit established the correct perspective in *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). After a careful review of the pertinent legislative history, the Fifth Circuit modified certain features of the seniority system but found no discrimination in a length-of-service criterion that fairly reflected actual

* As discussed at pp. 2-5, *supra*, petitioner Waters neither contended nor established that he was an individual victim of discrimination prior to 1964. Petitioners' argument that a "last hired, first fired" system perpetuates discrimination is therefore meaningless within the factual confines of this case.

service with the employer.* (416 F.2d at 994-95) (*See* App. 14a-15a; 502 F.2d at 1319).

More recent Circuit decisions have gone well beyond the present case, upholding a strict usage of employment seniority even where (1) the alleged discrimination in hiring post-dates Title VII, and (2) there are known victims of discriminatory hiring practices who may have timely substantive claims for an initial refusal to hire. See *EEOC* v. *Detroit Edison Co.*, 9 E.P.D. ¶ 9997 (6th Cir. 1975); *Jersey Central Power & Light Co.* v. *IBEW Local Unions*, 9 FEP Cases 117 (3d Cir. 1975). The result in these cases would mandate the Seventh Circuit's present decision *a fortiori*. But, each leaves the Seventh Circuit's narrow holding far behind and proceeds into issues of present hiring discrimination and seniority remedies that are not presented on the record of this case.

Moreover, petitioners have cited no Circuit decision that in any way conflicts even in principle with the appellate ruling in this case.** Their authorities fall into several groupings, each fundamentally distinct from the Seventh Circuit's decision. *First*, petitioners cite cases where the courts have approved seniority relief for independently

* *Local 189* was essentially a decision on various allegations of *discriminatory impact* arising from the seniority system. Thus: "No stigma of preference attaches to recognition of time actually worked in Negro jobs as the equal of white time. The individual victims of prior discrimination in this case would necessarily be the ones—the only ones—to benefit by the institution of mill [employment] seniority, as modified in the decree." (416 F.2d at 495). In *Franks* v. *Bowman Transportation Co.*, on the other hand, the Fifth Circuit extended the earlier decision and created limitations on the use of "constructive seniority" to remedy *proven incidents of discriminatory hiring*. (*See* 495 F.2d at 417-18).

** Two district court rulings do conflict in limited respects with the Seventh Circuit's decision. The first, *Watkins* v. *United Steel Workers Local No. 2369*, 369 F.Supp. 1221 (E.D. La. 1974), is currently pending on appeal before the Fifth Circuit. The second, *Delay* v. *Carling Brewing Co.*, 9 E.P.D. ¶ 9877 (N.D. Ga. 1974), relied on *Watkins* but conceded that its result was contrary to Congress' intent.

proven violations of Title VII. See, *e.g., Meadows* v. *Ford Motor Co.*, 9 E.P.D. ¶ 9907 (6th Cir. 1975). These decisions, like *Franks* v. *Bowman Transportation Co.*, involve questions of remedial power rather than substantive concepts of discrimination.

Second, petitioners rely improperly on union hiring-hall cases. See, *e.g., United States* v. *Sheet Metal Workers, Local 136,* 416 F.2d 123, (8th Cir. 1969). Such cases not only involve proven discriminatory impact, unlike the present case, but also distinguish themselves from employers' seniority systems. Thus, Senators Clark and Case indicated, in contrast to "last hired, first fired" seniority, that waiting lists which had been maintained on a discriminatory basis "may be held an unlawful subterfuge" if used *after* the enactment of Title VII. 110 *Cong. Rec.* 7213 (April 8, 1964), quoted in *United States* v. *Sheet Metal Workers, supra,* 416 F.2d at 134n.20.

Third, petitioners cite decisions dealing with criteria for promotions, job assignments, and overtime, which again involve proven discriminatory policies. See, *e.g., Rowe* v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972). Moreover, none of these cases involve layoffs and recalls. Nor do they apply Title VII retroactively to allegations of discrimination prior to the effective date of the Act so as to invalidate a neutral seniority system approved by Title VII.*

The Court of Appeals ruled narrowly and correctly in the present case. Petitioners mischaracterize the Seventh Circuit's decision as a blanket safeguard for established seniority rights, creating *per se* rules in favor of discriminatory seniority systems (Pet. 15-16) and flatly prohibiting the use of seniority remedies for proven unlawful discrimination (Pet. 9). The Seventh Circuit did none of these things. On the facts of this case, its decision is no vehicle for deciding the broad and ill-defined seniority issues that petitioners seek to raise.

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* As with the legislative history, all of petitioners' purported case analogies were developed in briefs below and were passed upon by the Seventh Circuit.

III.

Petitioners Totally Misconceive the Seventh Circuit's Ruling Under 42 U.S.C. § 1981.

Petitioners' claim under 42 U.S.C. § 1981 suffers the same infirmities as their claim under Title VII. Their argument regarding the earlier Civil Rights Act is premised, once again, on a fundamental confusion between substantive concepts of employment discrimination and the remedial features of the civil rights laws. Petitioners assert that the procedural and remedial independence of Title VII and Section 1981 warrants the creation of two sustantively inconsistent bodies of law.* They persistently ignore the Seventh Circuit's clear ruling that respondents' seniority system *caused no racial discrimination* and *perpetuated no racial discrimination.*

The Court of Appeals did not hold that Section 1981 remedies were subordinate to Title VII; nor did it hold that the subject-matter scope of Section 1981 was limited in any way by Title VII. The Seventh Circuit ruled only that, within their area of subject-matter overlap, the two statutes should be construed consistently with respect to employers' substantive obligations. Thus, "Having passed scrutiny [as being nondiscriminatory] under *the substantive requirements* of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981." (App. 16a, n.4; 502 F.2d at 1320 n.4). This ruling was preceded in the Seventh Circuit's opinion with an explanation of the proper interaction of the two statutes:

> "Title VII and Section 1981 are 'parallel or overlapping remedies against discrimination.' *Alexander* v. *Gardner-Denver Co.,* No. 72-5847, at p. 10 (U.S. 1974). Con-

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* Petitioners argue disingenuously at this point. In their Reply Brief to the Seventh Circuit, petitioners themselves stressed that, "If there is an analogous body of law for this Court to look to in fashioning a controlling body of substantive law in Section 1981 lawsuits, it is Title VII." (At p. 14).

The Seventh Circuit faced Samuels' claim on the following record: (1) petitioners had never sought to establish that a preference for former employees had any disproportionate adverse impact upon minority workers; (2) indeed, the evidence of record revealed that this hiring policy did *not* have any discriminatory impact; (3) at least for the time period of Samuels' job application, the District Court expressly found no racially discriminatory intent on the part of the two respondents; (4) Wisconsin Steel had no knowledge of Samuels' race or of the race of any other new job applicant; and (5) the first new applicant hired after Samuels applied also was black. (*See* pp. 8-10, *supra*). On this background, the precise issue posed to the Seventh Circuit was whether Samuels could claim to be a victim of racial discrimination simply because he happened to be black and because the recall of former employees happened to work to his personal disadvantage but not to the disadvantage of blacks generally. The Court of Appeals properly rejected that claim.

The Seventh Circuit recognized a legitimate and nondiscriminatory business reason for Wisconsin Steel's former-employee preference based on "experience," encompassing familiarity with plant operations and proven competence, loyalty, and reliability. This was not a "seniority" criterion, as petitioners suggest. Rather, it was a fundamental differentiation between two classes of workers—a differentiation that need not, and on the record of this case did not, correlate with any disproportionate racial impact.

No Circuit has ruled in conflict with the result in this case. Petitioners rely solely on *Gates* v. *Georgia Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974), which was a vastly different case on the facts and was expressly decided on those facts. (492 F.2d at 296).

Indeed, the court in *Gates* pointed out, as a general proposition, that "experience within the employing corporation is obviously a valid criterion for promotion and transfer."

326 F.Supp. 397, 398 (D.Ore. 1973). This Court, too, has acknowledged that past performance and past loyalty may be legitimate employment criteria: " 'Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust.' " *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 806 n.21, quoting *Garner* v. *Los Angeles Board*, 341 U.S. 716, 720 (1951). In the present case, the Seventh Circuit had no occasion to dwell at length on these obvious considerations, for petitioners had failed at the outset to show either that Wisconsin Steel's past-employee preference was inherently discriminatory against blacks, or that the company could even have known Samuels' race as a foundation for a claim of individual discrimination. (*See* pp. 9-10, *supra*).

On this record, no issue appropriate for *certiorari* is presented by the individual claim of petitioner Samuels.

V.

In Attacking the Period of Liability for Determining Waters' Back Pay Award, Petitioners Misstate the Pivotal Facts and Ignore the Element of Judicial Discretion in Formulating Equitable Relief.

The Court of Appeals affirmed respondents' liability to petitioner Waters for a period in 1967 based on the effect of the June 1966 "amendatory agreement" upon the timing of Waters' recall. (App. 16a-19a; 502 F.2d at 1321-22). The period of damages terminated on September 5, 1967, when Waters declined an offer of reinstatement to the *identical job* at the *same pay* that has been the basis of his claim throughout these proceedings. Waters had no reasonable ground on which to refuse this recall offer, except for the fact that he was employed elsewhere in "a more secure job." (*See* Pet. 28). Petitioners have shown no error in the Seventh Circuit's ruling on these facts, nor any conflict with other Circuit holdings.

Petitioners' misstatement of the pertinent facts has already been reviewed in detail. (*See* pp. 10-12, *supra*). In brief, their "waiver" contention is an unfair and wholly unsupported argument calculated to "generate heat" and "obscure the light" in determining the reasonableness of the Seventh Circuit's ruling. Waters' attack on the September 1967 job offer as being something less than his due seems now to have been based on Waters' invalid claim for seniority and back pay dating from 1964 or 1957. All of Waters' excuses in the Petition for not returning to work disintegrated on the evidentiary record and arguments made in the lower courts.

Waters' attempt to inflate his damages out of proportion to real injury is without support in petitioners' authorities. The original decision in *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F.2d 1038 (3rd Cir. 1973), vacated and remanded 414 U.S. 970 (1973), vacated and remanded 497 F.2d 403 (3rd Cir. 1974), has no precedential force and cannot form the basis of a conflict between the Circuits. The job offer in *Jurinko,* moreover, came in the context of a proposed settlement or waiver of further claim which the EEOC advised the plaintiff to reject as inadequate. (*See* 477 F.2d at 1040; 331 F.Supp. 1184, 1186 (W.D.Pa. 1971)). Waters, in contrast, could have accepted the job he was seeking and still have pursued his legal claim relating to the seniority system, a claim which was ultimately held invalid. In *Williams* v. *Albermarle City Board of Education,* 485 F.2d 232 (4th Cir. 1973), plaintiff was wrongfully terminated as school principal and, unlike petitioner Waters, was offered a *subordinate position* as a teacher. Even then, the plaintiff in *Williams* was held responsible for his unreasonable failure to mitigate damages by refusing the reinstatement offer. See also *Slack* v. *Havens,* 8 E.P.D. ¶ 9492 (S.D.Cal. 1973).

Petitioners overlook the consistency with which all courts have looked ultimately for *reasonableness* in the

behavior of a Title VII plaintiff and in the offer extended to him. The Seventh Circuit's decision rests on the special facts of this case as they bear upon the reasonableness of Waters' conduct. Since Wisconsin Steel routinely offered Waters the job he was seeking and Waters was free to accept and still pursue his claims, no reasonable basis exists for making respondents liable for all differentials in pay attributable to Waters' rejection of the job offer. Any suggestion to the contrary runs to the essential purpose of Title VII and Section 1981 to provide equal employment opportunity.*

CONCLUSION

This case simply does not present the issues raised by the Petition. A fair reading of the appellate court's opinion should persuade the reader that the court was careful to bottom its decision on the unique facts of this case. The court expressly cautioned employers that their reliance on seniority principles must be tempered by great sensitivity for possible unfairness to minorities in order to pass muster under both Title VII and Section 1981. In fact, the affirmance of liability as to Waters highlights the true character of the Seventh Circuit's decision.

In this connection, it should be noted that the Petition often criticizes the Court of Appeals for insensitivity to the spirit and purpose of the civil rights laws. In fairness, the Seventh Circuit through Chief Judge Swygert was one of the first courts in the country to sustain the applicability of Section 1981 to private employment discrimination in the initial appeal of this case. In its second opinion,

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* In addition to the fact that Waters was offered the job he had sought, it would be contrary to the goals of Title VII if an employer had to concede liability and pay past damages in order to avoid future damages—particularly where the employee is free to seek additional remedies under the Act.

challenged by the Petition, the court's concern for racial equality and justice is equally evident.

For the reasons stated, the Petition should be denied.

Respectfully submitted,

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